United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1315

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Appellee, -against- RANDY WILLIAM BROWN, Defendant-Appellant.	DOCKET NO. 75-1315

BRIEF FOR APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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CERTIFICATE OF SERVICE

This is to certify that on this 1st day of October, 1975, two copies of plaintiff's brief and appendix thereto were served by mail upon

Hon. Henry F. O'Brien
District Attorney of Suffolk County
Criminal Courts Building
County Center
Riverhead, New York 11901

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BRIEF FOR APPELLANT

Statement Of Questions Presented

1. Whether Appellant's claim for removal is valid.

2. Whether the allegations outlined in the petition for removal warrant a hearing on the issues.

Statement Of The Case

This appeal is from an order of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) rendered July 1, 1975, granting the motion of the District Attorney of Suffolk County, New York for an order remanding this action to Suffolk County Court.

Statement of Facts

The Appellant, a black resident of Suffolk County, alleges that he is a victim of police brutality, as well as the target of the pending criminal action lodged against him in the Suffolk County Court. Petition For Removal, paragraph 8. (13)* He further contends that this action may be removed to this Court pursuant to the provisions of Title 28, United States Code, Sections 1441 and 1443 et seg. Notice of Removal, paragraph 5. (12)

The racial nature of this action is clearly outlined in the omnibus motion, especially paragraph 5 B (3) thereof, filed on behalf of Appellant on June 11, 1974 (Attached to Notice of Removal as Exhibit "E" (21-22)); specifically requested, among other things, were the personnel file of police officer Michael E. Carmody, who allegedly brutalized defendant, and only those files of the Suffolk County Police Department's Legal and Inspection Brueau in which he was named or which otherwise related to him.

The Hon. Melvyn Tanenbaum, Suffolk County Judge, relying upon Section 240 of the Criminal Procedure Law of New York State, subsequently denied these requests (Notice of Removal, Exhibit "F")(26-29) even though the policy considerations, relating to the government's responsibility to the public, which resulted in the recently enacted New York State Freedom of Information Law, L. 1974, c. 578, § 2, ((1-3))** appear to be inconsistent with the exempt property provisions; moreover, the request was ". . . based on reliable information received from attorneys, the Suffolk County District Attorney's Office and others indicating that Patrolman Carmody makes a

*( ) Figures in parentheses refer to pages of the Appendix.

**(( )) Figures in double parentheses refer to pages of the Addendum.

practice of engaging in illegal conduct, particularly in his dealings with members of minority groups, and of using his official position to give his criminal activities the appearance of legality. Petition For Removal, Exhibit "E", paragraph 5.B.-3 (emphasis added) (22). Indeed, it is clear, from the papers submitted on behalf of Appellant, that Patrolman Carmody's actions against Randy Brown were racially motivated. Previously the officer had beaten and directed racial slurs at Bruce E. Jimmerson, a black resident of Wyandanch, Suffolk County, New York; in addition, he accused the latter of attacking him with a knife--an assertion that is consistent with Carmody's stereotyping of Blacks. Notice of Removal, Exhibit "O", Affidavit of Bruce E. Jimmerson. (33-34) It is significant that Carmody threatened another black resident of Suffolk County with a knife (Notice of Removal, Exhibit "R", paragraphs 5 and 6, Affidavit of Elisha Burch (36)); moreover, the racial biases of other members of the Suffolk County Police Department are clearly illustrated in the affidavit of Christine Burch. Annexed to Notice of Removal as Exhibit "S". (37-39) She is a black resident of Suffolk County, who was the target of racial slurs, and she witnessed the abuse of her son by members of the Suffolk County Police Department.

Argument

I.

APPELLANT'S CLAIM FOR REMOVAL IS VALID BECAUSE HE HAS SHOWN THAT: (a) THE RIGHTS UPON WHICH HE RELIES ARE RIGHTS WHICH ARE GUARANTEED BY FEDERAL LAW AND ARE STATED IN TERMS OF RACIAL EQUALITY; and (b) IT CAN BE PREDICTED BY REFERENCE TO A STATE LAW OF GENERAL APPLICATION THAT THE APPELLANT WILL BE DENIED OR CANNOT ENFORCE THE SPECIFIED FEDERAL RIGHTS IN STATE COURTS.

It is uncontested that subdivision 1 of Title 28 U.S.C. Sec. 1443

makes it ". . . essential for removal [under that section] that the prosecution be '(a)gainst any person who is denied or cannot enforce (one of his civil rights) in the courts of . . . [a] State', and that the right must be one arising 'under any law providing for the equal civil rights of citizens of the United States.'" Memorandum of Law In Support of Plaintiff's Motion To Remand, p. 3. (40) Indeed, the racially motivated misconduct of police officer Carmody is clearly prohibited by the language of Title 18 U.S.C. 242 and Title 42 U.S.C. 1981. In State of Louisiana v. London, 335 F. Supp. 585, 588 (E.D.La. 1971), the United States District Court declared that Title 42 U.S.C. 1981 clearly constituted ". . . specific racial equality legislation . . ." and that infringement of the rights protected thereby would require removal.

In addition, it can be predicted that Appellant will not be able to enforce these specified federal rights in state court because of the state court's reliance on C.P.L. 240.10 and C.P.L. 240.20 which define "exempt property" and exclude it from discovery and inspection. Therefore, these statutes, on their face, invite the judicial interpretation that deprives petitioner of information essential to his defense in state court. The provisions clearly encourage the cover-up of police brutality and consequently have led to Appellant's prosecution as well as to the abuse of several citizens by a police officer who is secure in the knowledge that outrages committed by him are beyond the reach of the criminal justice system. Please see Exhibit "M", (30-32), and that any internal police response to his criminal activity will, unlike Court proceedings, be kept secret.

In accordance with the decision in Georgia v. Rachel, 384 U.S. 780, 800 (1966), the removal motion should be granted because the state statute without doubt ". . . interposes a bar to [Appellant's] . . . enforcing [his rights]." It is noteworthy that the sections of the federal law which deal

with pre-trial discovery are clearly ". . . far more liberal and precise than anything to be gleaned from New York case law . . .". Commentary accompanying Section 240 of the Criminal Procedure Law of New York State, McKinney's Consolidated Laws of New York, C.P.L. 240, p. 466. In the instant case ". . . the denial /of Appellant's rights is/ . . . manifest in a formal expression of state Law"; thus, removal is required. Memorandum in Support of Plaintiff's Motion to Remand, citing Georgia v. Rachel, supra; see also Greenwood v. Peacock, 384 U.S. 808 (1966). (41)

Moreover, the deprivation of rights appears with clarity prior to trial; consequently, this is a case in which the task of predicting the denial does "not involve a detailed analysis by a federal judge of the " expected future conduct of a State Court.

II.

THE ALLEGATIONS OUTLINED IN THE PETITION FOR REMOVAL WARRANT A HEARING ON THE MOTION TO REMAND.

Appellant's allegations compel the conclusion that his prosecution is, in itself, the equivalent of a discriminatory state enactment, because it can clearly be predicted that Appellant will be denied or unable to enforce specific federal rights in state court. Please see Georgia v. Rachel, supra, 384 U.S. 804, a case involving a similar situation, in which the Supreme Court concluded: ". . . if . . . the mere pendency of the prosecutions enables the federal court to make the clear prediction that the defendants will be "denied or cannot enforce in the courts of /the/ state" the right to be free of any "attempt to punish" them for protected activity . . . /,it/ is no answer in these circumstances that the defendants might eventually prevail in the state court. The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964 . . ."

It is now clear that at a state trial Appellant will be deprived of information necessary to the effective presentation of his defense. Thus, there is a clear right to a hearing for factual development. Memorandum In Support of Plaintiff's Motion to Remand. (42) Moreover, the impact of Section 240 of the C.P.L., in depriving Appellant, and other black citizens, of his civil rights, can be demonstrated at a hearing. See Affidavit of Christine Burch annexed to Notice of Removal as Exhibit "S" (37-39) Indeed, in Louisiana v. London, supra., the Court held an evidentiary hearing before it subsequently remanded the case because of the failure of the Defendant to show at that hearing that he had relied on a right under a Federal Law providing for equal civil rights and that he would be denied or could not enforce that right in the courts of the State of Louisiana.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER SHOULD BE REVERSED AND THE CASE REMOVED TO FEDERAL COURT, OR ALTERNATIVELY, A HEARING SHOULD BE ORDERED TO PERMIT THE FACTUAL DEVELOPMENT OF THE SERIOUS AND SUBSTANTIAL ALLEGATIONS SET FORTH IN APPELLANT'S PETITION FOR REMOVAL AND THE SUPPORTING DOCUMENTS.

Dated: Port Washington, New York
September 30, 1975

Respectfully submitted,

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the norms of conduct for members, officers and employees of the legislature and state agencies.

Added L.1965, c. 1012, § 10; amended L.1969, c. 656, eff. May 21, 1969.

L.1969, c. 656, eff. May 21, 1969, substituted "sections seventy-three, seventy-four, seventy-five, seventy-six, seventy-seven and seventy-eight of the chapter together with" for "this article and" and "intent thereof" for "intent of sections seventy-three, seventy-four, seventy-five, seventy-six, seventy-seven and seventy-eight of this chapter."

Section derived from former section 88 of the Legislative Law as added L.1964, c. 941, § 2, and repealed L.1965, c. 1012, § 7, eff. Jan. 1, 1966.

Index to Notes

1. Generally

The requirement for filing a certificate acknowledging receipt of a copy of certain ethics provisions applies only to employees entering the State service on or after January 1, 1966, it does not apply upon promotion or title change subsequent to that date where the original appointment is prior thereto. 1965, Op.Atty.Gen. 11.

2. Copy to be furnished

A new appointee need be furnished with a copy of sections 73-78 only, which deal with ethical standards and conflicts of interest. 1965, Op.Atty. Gen. 28.

§ 79. Fine in certain cases

Where an officer or a member of a board or other body has without just cause refused or neglected to perform a public duty enjoined upon him by a special provision of law, a court may impose a fine, not exceeding two hundred fifty dollars, upon the officer or member who has so refused or neglected, to be paid into the treasury of the state. Added L.1962, c. 310, § 381, eff. Sept. 1, 1963.

Section derived from CPA § 1302, added L.1937, c. 520; repealed by CPLR § 10001.

ARTICLE 5—DELIVERY OF PUBLIC BOOKS

§ 80. Delivery of books and papers, money and property

3. Duty to turn over records

A retiring town supervisor must surrender the books and records pertaining to his office immediately upon leaving office. 20 Op.State Compt. 50, 1970.

Upon the expiration of his term, a town supervisor is required to surrender his account books to the town clerk and other books and records of his office to his successor in office, and may be compelled to do so by appropriate legal action. Op.State Compt. 69-696.

A justice of the peace must permanently keep on file traffic summonses and informations based upon violations of the Vehicle and Traffic Law and when he leaves office they should be turned over to his successor. 18 Op.State Compt. 314, 1962.

Former supervisor may be compelled to surrender all books and papers pertaining to office by appropriate legal action. 12 Op. State Compt. 232, 1956.

ARTICLE 6—FREEDOM OF INFORMATION LAW [NEW]

Former Art. 6. Renumbered 7.

§ 85. Legislative intent

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the

public is aware of government actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent on the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of government decision-making and the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free news media, should have unimpaired access to the records government.

Added L.1974, c. 578, § 2; amended L.1974, c. 579, § 1.

1974 Amendment. L.1974, c. 579, § 1, eff. Sept. 1, 1974, deleted "set forth herein below" following "records of government" in paragraph beginning "The legislature therefore declares."

Effective Date. L.1974, c. 578, § 2, provided that this section shall take effect Sept. 1, 1974.

§ 86. Short title

This article shall be known and may be cited as the "Freedom of Information Law."

Added L.1974, c. 578, § 2.

Effective Date. L.1974, c. 578, § 2, provided that this section shall take effect Sept. 1, 1974.

§ 87. Definitions

As used in this article: 1. "Agency" means any state or municipal board, bureau, commission, council, department, public authority, public corporation, division, office or other governmental entity performing a governmental or proprietary function for the state of New York or one or more municipalities therein.

2. "Municipality" or "municipal" means or has reference to any city, county, town, village, school district, fire district, water district, sewage district, drainage district or special district established by law for any public purpose.

Added L.1974, c. 578, § 2.

Effective Date. L.1974, c. 578, § 2, provided that this section shall take effect Sept. 1, 1974.

§ 88. Access to records

1. Each agency, in accordance with its published rules, shall make available for public inspection and copying:

a. final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

b. those statements of policy and interpretations which have been adopted by the agency and any documents, memoranda, data or other materials constituting statistical or factual tabulations which led to the formulation thereof;

c. minutes of meetings of the governing body, if any, of the agency and of public hearings held by the agency;

d. internal or external audits and statistical or factual tabulations made by or for the agency;